NTSB Order No.
EM-92

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 14th day of October, 1981

JOHN B. HAYES, Commandant, United States Coast Guard

vs.

MICHAEL A. STRELIC, Appellant.

Docket No. Me-85

OPINION AND ORDER

Appellant seeks review of the Commandant's decision (Appeal No. 2237) affirming a probationary suspension of his master's license (No. 388977) for neglect of duty aboard the SS AMOCO CONNECTICUT, a 12,491 gross ton tankship. The initial decision was issued by Administrative Law Judge John J. O'Malley, Jr., after holding a full evidentiary hearing.[1]

The law judge found that on December 20, 1978, while the AMOCO CONNECTICUT was being navigated in Narragansett Bay, during a voyage from Pascagoula, Mississippi, to Providence, Rhode Island, the vessel's position was not plotted on a chart of the area as required by 33 CFR 164.11(c). [2] From the time of entering the Bay, abeam Brenton Reef Light, until docking at Providence (between 0354 and 0706 hours) the vessel was under the navigational control of a

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[1]Copies of the decisions of the Vice Commandant (acting by delegation 33 CFR 1.01-40) and the law judge are attached.

[2]The regulations of Part 164, with exceptions not relevant herein, apply to vessels of 1600 or more gross tons operating in navigable waters of the United States. 33 CFR 164.01. Section 164.11(c) thereof provides as follows:
"§164.11 Navigational underway: General.
The owner, master, or person in charge of each vessel underway shall ensure that:
* * * * *
(c) The position of the vessel at each fix is plotted on a chart of the area and the person directing the movement of the vessel is informed of the vessel's position."

compulsory state pilot. Others stationed on the bridge were the appellant, the second mate, and the helmsman. The passage was uneventful but appellant, serving as master, was nevertheless held at fault for failing to assure compliance with the regulation, which is intended "to supplement the functioning of a pilot."[3] Based on these findings, his license was suspended for 3 months on 12 months' probation.

Appellant contends on appeal that the charge of negligence was not sustained, and that the sanction was unauthorized or, in the alternative, excessive. He also disputes certain findings in the Commandant's decision. Counsel for the Commandant has filed a reply brief.[4]

Upon review of the record and the parties' briefs, we have concluded that appellant was guilty of inattention to duty, a lesser offense included within the negligence charge. Consequently, a reduction of sanction is warranted.

Appellant argues that the Coast Guard adduced no evidence as to what a reasonably prudent mariner would have done under the circumstances, and therefore failed to prove its case. On the contrary, we find that the Coast Guard was entitled to rely on the regulatory violation into danger - in that a competent ship's officer is verifying the pilot's navigation by plotting the vessel's position periodically and thus facilitating an appraisal of the safety of the selected course. By plotting the vessel's position on navigation charts, the master is better able to consult with the pilot or take over for him if the need arises. If plotting is not done, and added element of safety is lost. In our view, the regulation represents a standard of conduct or care to be exercised by the prudent master, and a master's failure to conform to that standard is evidence of negligence.

Since the Coast Guard offered no evidence of local customs and practices, appellant argues that a necessary element of proof was lacking under 33 U.S.C. 1224 (a)(9) of the Ports and Waterways

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[3]Preamble to Part 164, published January 31, 1977; 42 Fed. Reg. 5956, 5957 (I.D. 12).

[4]In addition to his original brief, appellant has filed a brief in reply to the Commandant. It has been considered, although not provided for in the Board's rules of procedure. 49 CFR 825.20. Appellant's furthers request for oral argument is denied. 49 CFR 825.25.

Safety Act.[5] He is mistaken. That section of the Act refers only to the previous section relating to vessel traffic systems, special powers, and port access routes. It has no application to section 1231 of the Act, under which the regulations in 33 CFR Part 164 were promulgated.

Appellant next argues for a rule of strict construction in view of the criminal penalty prescribed in the Ports and Waterways Safety Act. The Act provides for both civil and criminal liability and the latter, consisting of a $50,000 fine or imprisonment for five years, or both, is reserved for persons committing "willful and knowing" violations of its provisions or regulations issued thereunder.[6] Since those elements are incompatible with simple negligence, the offense charged against appellant, the rule obviously does not come into play.[7] Moreover, we reject appellant's notion that a change made during the rulemaking process, wherein a proposal to require fixing and plotting vessel positions every 15 minutes was withdrawn because "this would not be practicable in all navigable waters",[8] created a regulation that required no particular action in any specific body of water; and the claim that frequent plotting on his vessel's approach to Brenton Reef Light satisfied the regulatory requirement. Rather, we agree with the law judge that it does not follow from the fact that "the number of fixes and plots cannot be determined precisely

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[5]Section 1224(a)(9) provides:
"§1224. Considerations by Secretary.
In carrying out his duties and responsibilities under section 1223 of this title, the Secretary [of the department in which the Coast Guard is operating] shall--
(a) take into account all relevant factors concerning navigation and vessel safety and protection of the marine environment including by not limited to--
* * * * *
(9) local practices and customs, including voluntary arrangements and agreements within the maritime community...".

[6]33 U.S.C. 1232(b).

[7]"When a statute is both penal and remedial it should be considered as a penal statute when it is sought to enforce the penalty and as a remedial statute when it is sought to enforce the civil remedy". Nuclear Corporation of America v. Hale, 355 F. Supp. 193, 197 (N.D. Texas 1973), aff'd 479 F.2d 1045 (5 Cir, 1973).

[8]Ftn. 3 supra, at 5957. See notice of proposed rulemaking published May 6, 1976; 41 Fed. Reg. 18766-18770, at 18767.

in all circumstances... that no regulation is valid" (I.D. 12); or that any number of plots made while the vessel was in territorial waters outside the Bay would justify making none at all during the 3-hour transit of the Bay itself.

Appellant fares no better with his first argument on sanction. Here again he has invoked the Ports and Waterways Safety Act in claiming that its monetary fines are the exclusive enforcement mechanism. Again he begs the question since the case was not brought under that Act but pursuant to 46 U.S.C. 239, authorizing suspension actions as a means of enforcing standards of conduct deemed essential to safety at sea. Moreover, the validity of the suspension order would not be affected in any event by the existence under other statutory authority, of civil or penal sanctions for the same offense.[9] The argument is without merit.

Appellant correctly points out that there is no evidentiary basis for the Commandant's findings to the effect that the vessel's position, while underway in the Bay, were recorded in the engine bell book by the second mate (C.D. 3,5), since the bell book was not introduced and these findings are reversed. Appellant also asserts that the Commandant's references (id.) to a lack of evidence showing that the second mate communicated such positions to the pilot are of no significance, since they have nothing to do with the offense charged. Appellant is correct and there references are rejected as irrelevant.

The sole issues presented by the pleadings concerned whether fixes were taken and plotted during the vessel's transit of Narragansett Bay. According to the second mate, whose testimony is unchallenged, nothing was plotted on charts after taking on the pilot (in the vicinity of Brenton Reef Light) although radar bearings and ranges were taken using "the available lights and buoys and ... distinguishing feature on shore" (C.G. Exh.6, dep. tr. at 5,6).[10] Thus it is apparent that appellant breached one of his duties under the regulation, albeit in a minor respect since the law judge found that the "vessel's officers were aware of the

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[9]See Commandant v. Payne, NTSB Order No. EM-64, adopted November 9, 1977, citing Cella v. United States, 208 F.2d 783, 789 (7 Cir. 1953), cert. den. 347 U.S. 1016 (1954).

[10]He added that "before we picked up the pilot when we were approaching Brenton Reef Light, positions were plotted frequently" (id. at 6).

vessel's position at all times".[11] We therefore agree with appellant that the sanction is excessive and find that an admonition is commensurate with the nature of the offense established in this case.[12]

ACCORDINGLY, IT IS ORDERED THAT:

1 The appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for herein; and

2. The order suspending appellant's license for 3 months on 12 months' probation, as affirmed by the Commandant, be and it hereby is modified to provide that an admonition be entered against the appellant for inattention to duty.

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above opinion and order.

[11]This was done by accepting appellant's proposed finding of fact No. 7 (I.D. 8).

[12]A formal admonition or warning is the least sanction that can be imposed under the Coast Guard regulations upon finding a charge proved. See 46 CFR 20-170(b).